No. 48244-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

William Grisso,

Appellant.

Pierce County Superior Court Cause No. 14-1-02695-3

The Honorable Judge Elizabeth Martin

Appellant's Opening Brief

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STATEMENT OF FACTS AND PRIOR PROCEEDINGS

William Grisso and his son, Tim Grisso, had a history of problems in their relationship. Memorandum (filed 9/18/15), Supp CP; RP[1] 240. At one point, Tim[2] threatened to put Mr. Grisso in prison for the rest of his life. Memorandum (filed 9/18/15), Supp. CP.

A few months later, Mr. Grisso's fiancé, Nancy Gardner, disappeared. RP 287-291. Mr. Grisso called the police to report Gardner as a missing person. RP 283-284.

Mr. Grisso told the officer that he had come home from running errands and Gardner was not there. RP 298-291. He said that she had left all of her belongings, including her purse, but that her handgun was not where she usually left it. RP 291.

Mr. Grisso was worried that Gardner was suicidal because she had been showing signs of depression. RP 369, 827. Gardner had given Mr. Grisso her family's contact information the day before and told him to call them if anything happened to her. RP 289.

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[1] All citations to the Verbatim Report of Proceedings refer to the chronologically numbered volumes spanning 9/11/15 through 10/8/15.

[2] Counsel will refer to Timothy Grisso as "Tim" throughout this brief to differentiate him from Mr. Grisso, the appellant. No disrespect is intended.

Mr. Grisso and Gardner had become estranged and he had recently asked her to move out of his home.[3] RP 451-452. He had also started seeing a previous girlfriend, Carolynne Rapier. RP 526-541.

Mr. Grisso cooperated with police fully. RP 482. He let them search his home, his truck, and Gardner's car. RP 435-438, 482-483. He gave Gardner's cellphone to the officers. RP 483.

Mr. Grisso told the officers that they would find a gun in his car. RP 435. He showed them his concealed weapon permit. RP 435.

Mr. Grisso went to stay with Rapier in her apartment while the police searched for Gardner. RP 436.

About a week after Gardner's disappearance, Mr. Grisso needed to go back to his house to get some belongings. RP 481. He called the police and asked for a civil standby because he was afraid that Gardner may have been at the house with a gun. RP 481, 558.

Mr. Grisso posted legal notices on his house, evicting Gardner. RP 426-427. One of the officers had told him he needed to do that if he didn't want her to be able to move back in when she returned. RP 428.

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[3] Gardner told Mr. Grisso that she would move out when she was ready. RP 452. Mr. Grisso decided to let her stay because he was going to lose the house to foreclosure two months later anyway. RP 465

More than a week after Gardner's disappearance, the police found her decomposing body in a state park. RP 520-522. She had been shot in the head twice. RP 879-882.

The police arrested Mr. Grisso and the state charged him with first degree, premeditated murder. RP 645; CP 1-2.

While he was in jail, Mr. Grisso received letters addressed from Tim.[4] Ex 165-167. Tim confessed to the murder in the letters. Ex. 165. He said that he had made good on his threat to put his father behind bars. Ex. 166A.

Tim's girlfriend at the time of Gardner's murder testified at trial. RP 953-972. She said that Tim had borrowed her car and been gone all day on the day after Gardner went missing. RP 958-959. When she got her car back, her handgun had been moved from the center console to a container on the driver-side door.[5] RP 961.

The state presented evidence that Mr. Grisso's shoes had Gardner's blood on them. RP 900. The state also produced Mr. Grisso's cellphone records, showing that he had made calls on the day Gardner went missing

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[4] The state's handwriting expert testified at trial that he could neither confirm nor dispel that the letters had been written by Tim. RP 1039.

[5] Tim's girlfriend's gun was made by one of the manufacturers listed as having possibly produced the gun that shot the bullets that killed Gardner. Memorandum (filed 9/18/15), Supp. CP. But a state witness opined that the bullets that killed Gardner could not have come from that specific gun because it was the wrong size. RP 863.

that transmitted from towers near where her body was found. RP 722; Ex. 97. The state claimed that Gardner's cellphone records indicated that she had been with Mr. Grisso the whole day. RP 666-691. The state also alleged that Gardner had taken pictures on her phone of flowers in the state park where her body was later found. RP 690. The police found the gun Mr. Grisso had reported missing at Rapier's apartment. RP 396-398. But Mr. Grisso's gun – which is very similar – was not found. RP 56.

During closing, the prosecutor argued that Mr. Gardner's text messages with Rapier from the day Gardner went missing -- in which he said he did not want to lose Rapier and invited her to his house later that evening – were evidence that he had formed premeditated intent to kill Gardner. RP 1110.

The prosecutor showed the jury a projected slide of a jigsaw puzzle. RP 1141-1147, 1151. When five of the six pieces were filled in, the prosecutor told the jury that:

> … at some point, you've seen enough. You have enough evidence. You've seen enough pieces of the puzzle to know beyond a reasonable doubt what the picture portrays. You have an abiding belief in the truth that this is a picture of the Tacoma Dome. RP 1147.

The prosecutor ended his closing argument with this:

> So the last thing I am going to ask you is to return the only verdict that reflects the truth of what happened, the only verdict that is just for Nancy Gardner, for her family and for our community.

RP 1147.

The court's instruction on the state's burden of proof informed the jury that they were convinced of Mr. Graves's guilt beyond a reasonable doubt if, after considering all of the evidence, they had "an abiding belief in the truth of the charge." CP 44.

The jury found Mr. Grisso guilty. CP 37. This timely appeal follows. CP 80.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT MR. GRISSO PREMEDITATED GARDNER'S DEATH.

The state did not present any evidence that Mr. Grisso planned to kill Gardner. There was no indication that he made any statements or took any action toward harming Gardner in any way until the time of the shooting.

The state's evidence of premeditation consisted of two text messages that Mr. Grisso sent to Rapier: one saying that he did not want to lose her again, and one inviting her to his home that evening. Ex 47.

But that evidence proved only that Mr. Grisso planned to get back together with Rapier. He had already asked Gardner to move out and broken things off with her. RP 451-453. He did not need to kill her to rekindle his relationship with Rapier.

The state's evidence of premeditation was equivocal at best. As such, no rational jury could have found premeditation proved beyond a reasonable doubt. *State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986); *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318 (2013).

A. The state's evidence was insufficient to prove that Mr. Grisso acted with premeditated intent.

To convict Mr. Grisso of first degree murder, the state was required to prove beyond a reasonable doubt that he acted with premeditation. CP 1-2.

Premeditation is "the deliberate formation of and reflection upon the intent to take a human life. *Bingham*, 105 Wn.2d at 823. The element requires proof of "the mental process of thinking beforehand, deliberation, reflection, weighing or reasoning for a period of time, however short." *Id.* Premeditation must involve "more than a moment in point of time." *Id.*; RCW 9A.32.020(1).

Premeditation may be proved by circumstantial evidence only if "the inferences drawn by the jury are reasonable and the evidence supporting the jury's finding is substantial." *State v. Gentry*, 125 Wn.2d 570, 599, 888 P.2d 1105 (1995).

Thus, for example, proof that a killing occurred by manual strangulation, by itself, is insufficient to support a finding of

premeditation. *Bingham*, 105 Wn.2d at 828. This is because the state must prove actual deliberation, not the mere opportunity to deliberate. *Id.* at 827.

Typically, circumstantial proof of premeditated intent requires some showing that the accused planned the killing ahead of time or demonstrated clear intent to kill over more than a moment in time. *Id.*

There was no evidence at Mr. Grisso's trial that he deliberated upon or planned Gardner's death. The evidence that he intended to get back together with Rapier was only tenuously relevant because there was no evidence that he would need to kill Gardner in order to do so.[6]

Evidence is insufficient to prove an element of an offense when, taking the evidence in the light most favorable to the state, no rational jury could have found the necessary facts proved beyond a reasonable doubt. *Bingham*, 105 Wn.2d at 823.

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[6] The prosecutor also argued that the fact that Gardner was shot two times was evidence of premeditation. This court once held that the fact that the accused shot an alleged victim three times was sufficient to infer premeditation. *State v. Rehak*, 67 Wn. App. 157, 164, 834 P.2d 651 (1992). But, as argued below, *Rehak* and other similar cases violate due process by improperly applying the substantial evidence standard to the sufficiency analysis. *Id.*

The Supreme Court has also held that, standing alone, "multiple wounds and sustained violence cannot support an inference of premeditation." *Bingham,* 105 Wn.2d at 826. To reason otherwise would "obliterate[] the distinction between first and second degree murder." *Id.*

This court should not follow its prior holding in *Rehak.*

An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *Vasquez*, 178 Wn.2d at 14. The state argued that Mr. Grisso's texts to Rapier saying that he did not want to lose her and inviting her to his home was evidence that he was planning to kill Gardner. But they also could have been evidence that he was planning to leave Gardner once and for all.[7] They could have been evidence that he was going to demand that Gardner move out of his home.[8]

Mr. Grisso's text messages were not proof beyond a reasonable doubt of premeditated intent to kill Gardner.

The prosecutor also claimed that Mr. Grisso's taking Gardner to a secluded area was evidence of premeditation. RP 1109. But the "secluded area" was a state park with flowers in bloom. RP 520-52, 690. People go there regularly for countless innocent purposes. Taking a friend for a walk in nature is not proof beyond a reasonable doubt of premeditated intent to kill them.

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[7] Indeed, Mr. Grisso moved into Rapier's apartment the next day. RP 436.

[8] In fact, Mr. Grisso posted notice evicting Gardner from his home a few days later. RP RP 426-427.

The state's evidence of premeditation was equivocal at best.[9] No rational jury could have found premeditation proved beyond a reasonable doubt in Mr. Grisso's case. *Id.*

The state presented insufficient evidence to prove that Mr. Grisso formed the premeditated intent to kill Gardner. Mr. Grisso's conviction must be reversed.

B. Equivocal evidence, alone, is insufficient to prove an alleged fact beyond a reasonable doubt. Insofar as prior authority can be read to uphold a conviction for first degree murder in the face of only the *possibility* that the accused acted with premeditation, that rule violates due process.

The requirement that the state prove each element of an offense beyond a reasonable doubt is a bedrock principle of due process. *In re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. Amend. XIV.

The substantial evidence standard is inadequate to determine the sufficiency of the evidence because it does not require proof beyond a reasonable doubt. *Vasquez*, 178 Wn.2d at 6.

Even so, numerous Washington appellate cases have upheld jury findings of premeditation using the substantial evidence standard. Indeed,

[9] Presence of a weapon is not evidence of premeditation if the accused regularly carries the weapon. *See State v. Millante*, 80 Wn. App. 237, 248, 908 P.2d 374 (1995). Because Mr. Grisso regularly carried his handgun, its alleged presence at the state park was not evidence of premeditation. *Id.*; RP 435.

it has become axiomatic that circumstantial evidence is enough to support a finding of premeditation when "the jury's inferences are reasonable and substantial evidence supports the jury's verdict." *See e.g. State v. Sherrill,* 145 Wn. App. 473, 484, 186 P.3d 1157 (2008).[10]

A careful reading of Washington premeditation precedent demonstrates that the courts' use of the phrase "substantial evidence" was not just a poor choice of words. Rather, the courts regularly affirm premeditated murder convictions based on evidence of the mere *possibility* that the accused deliberated or reflected upon the killing ahead of time. *See e.g. State v. Ortiz,* 119 Wn.2d 294, 312-13, 831 P.2d 1060 (1992) *disapproved of on other grounds by State v. Condon,* 182 Wn.2d 307, 343 P.3d 357 (2015) (lapse in time gave the accused the opportunity to deliberate, so the jury was justified in finding that he did, in fact, deliberate); *State v. Gibson*, 47 Wn. App. 309, 734 P.2d 32 (1987) (same); *State v. Sargent*, 40 Wn. App. 340, 353, 698 P.2d 598 (1985) (same).

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[10] *See also State v. Finch,* 137 Wash. 2d 792, 831, 975 P.2d 967, 991 (1999); *State v. Gentry,* 125 Wash. 2d 570, 598, 888 P.2d 1105, 1123 *(1995), aff'd sub nom. Gentry v. Sinclair,* 693 F.3d 867 (9th Cir. 2012), *and aff'd sub nom. Gentry v. Sinclair,* 705 F.3d 884 (9th Cir. 2013), *and aff'd sub nom. Gentry v. Sinclair,* 693 F.3d 867 (9th Cir. 2012*), and aff'd sub nom. Gentry v. Sinclair,* 705 F.3d 884 (9th Cir. 2013); *State v. Pirtle*, 127 Wash. 2d 628, 643, 904 P.2d 245, 255 (1995); *State v. Hoffman*, 116 Wash. 2d 51, 83, 804 P.2d 577, 594 (1991); *State v. Longworth*, 52 Wash. App. 453, 467, 761 P.2d 67, 74-75 (1988); *State v. Bushey*, 46 Wash. App. 579, 584, 731 P.2d 553, 556 (1987); *State v. Gibson*, 47 Wash. App. 309, 310, 734 P.2d 32, 34 (1987); *State v. Luoma*, 88 Wash. 2d 28, 33, 558 P.2d 756, 759 (1977).

An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *Vasquez*, 178 Wn.2d at 14. Insofar as Washington precedent can be read to permit a conviction for premeditated murder based only on evidence that the accused may have deliberated or had the opportunity to do so, that rule violates due process. *Winship*, 397 U.S. at 363; *Bingham*, 105 Wn.2d at 827.

The Court of Appeals and Supreme Court precedent applying the substantial evidence standard – rather than the beyond a reasonable doubt standard – to claims of insufficient evidence of premeditation on appeal is incorrect and harmful. Those cases violate due process and must be overruled. *Winship*, 397 U.S. at 363; *Rose v. Anderson Hay & Grain Co.*, 184 Wn.2d 268, 282, 358 P.3d 1139 (2015).

As the Supreme Court has recognized:

> The facts of a savage murder generate a powerful drive, almost a juggernaut for jurors, and indeed for judges, to crush the crime with the utmost condemnation available, to seize whatever words or terms reflect maximum denunciation, to cry out murder "in the first degree." But it is the task and conscience of a judge to transcend emotional momentum with reflective analysis.

Bingham, 105 Wn.2d at 827-28 (*quoting Austin v. United States*, 382 F.2d 129, 138-139 (D.C.Cir. 1967)).

Even if this court determines that the state presented enough evidence in Mr. Grisso's case for a jury to conclude that he *could have*

premeditated Gardner's death, no reasonable fact finder could have found that he did so beyond a reasonable doubt given the equivocal evidence. Mr. Grisso's conviction must be reversed. *Winship*, 397 U.S. at 363; *Bingham*, 105 Wn.2d at 827.

II. PROSECUTORIAL MISCONDUCT DEPRIVED MR. GRISSO OF A FAIR TRIAL

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22.

To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Prosecutorial misconduct during argument can be particularly prejudicial. There is a risk that jurors will lend it special weight "'not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office.'"

Glasmann, 175 Wn.2d at 706 (quoting commentary to the *American Bar Association Standards for Criminal Justice* std. 3–5.8).

A. The prosecutor committed misconduct by mischaracterizing the jury's role and appealing to the passion and prejudice.

The prosecutor at Mr. Grisso's trial closed his argument with this:

> ... the last thing I am going to ask you is to return the only verdict that reflects the truth of what happened, the only verdict that is just for Nancy Gardner, for her family and for our community. RP 1147.

The prosecutor committed misconduct by charging the jury with searching for the truth and protecting the community rather than with holding the state to its constitutional burden. The prosecutor's argument also improperly appealed to the jury's passion and prejudice.

A jury's role is to determine whether the state has proved each element of an offense beyond a reasonable doubt, not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *Winship,* 397 U.S. at 364. Consequently, a prosecutor commits misconduct by telling the jury that its job is to declare the truth of what happened. *Id.*

It is also misconduct for a prosecutor to make arguments designed to inflame the jury's passion and prejudice. *Glasmann*, 175 Wn.2d at 704. Accordingly, it is improper for a prosecutor to encourage a jury to convict in order to protect the community. *State v. Thierry*, 190 Wn. App. 680,

690, 360 P.3d 940 (2015), *review denied,* 185 Wn.2d 1015, 368 P.3d 171 (2016).

The prosecutor at Mr. Grisso's trial advocated for conviction so the jury could find the truth, protect the community, and seek justice for Gardner. RP 1147. But none of those things are the jury's role. *Emery*, 174 Wn.2d at 760; *Winship,* 397 U.S. at 364. The prosecutor mischaracterized the state's burden and appealed to the jury's passion and prejudice. The argument was improper. *Id.*; *Glasmann*, 175 Wn.2d at 704, 706-07.

Mr. Grisso was prejudiced by the prosecutor's improper argument. *Glasmann*, 175 Wn.2d at 704. As outlined above, the evidence that Mr. Grisso formed premeditated intent to kill Gardner was far from overwhelming. The prosecutor chose to address the state's evidentiary shortcomings by focusing the jury's emotions and confusing the jury's role. There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Grisso's trial.

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012).

Prosecutorial misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. At the time of Mr. Grisso's trial, there was long-standing precedent prohibiting prosecutors from urging the jury to seek the truth, from appealing to the jury's emotions, and from asking the jury to protect the community. *See e.g. Id.*; *Emery*, 174 Wn.2d at 760; *Thierry*, 190 Wn. App. at 690; *See also* American Bar Association, Standards for Criminal Justice std. 3–5.8(c) (2d ed. 1980) ("The prosecutor should not use arguments designed to inflame the passion or prejudices of the jury."). The prosecutor's misconduct was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The arguments were also inflammatory, and, accordingly, not curable by an instruction. *Pierce*, 169 Wn. App. at 552.

The prosecutor at Mr. Grisso's trial committed flagrant and ill-intentioned misconduct by mischaracterizing the jury's role and appealing to the jury's emotions. *Glasmann*, 175 Wn.2d at 704; *Emery*, 174 Wn.2d at 760; *Thierry*, 190 Wn. App. at 690. Mr. Grisso's conviction must be reversed. *Id.*

B. The prosecutor committed misconduct by minimizing and quantifying the state's burden of proof with a jigsaw puzzle analogy.

The prosecutor closed his argument in Mr. Grisso's trial by showing the jury a slide of a jigsaw puzzle containing six pieces. RP 1141-1147, 1151. When five of those pieces were in place, the prosecutor told the jury that:

> ... at some point, you've seen enough. You have enough evidence. You've seen enough pieces of the puzzle to know beyond a reasonable doubt what the picture portrays. You have an abiding belief in the truth that this is a picture of the Tacoma Dome. RP 1147.

A prosecutor commits misconduct by attempting to quantify the state's burden of proof. *State v. Fuller*, 169 Wn. App. 797, 825-827, 282 P.3d 126 (2012).

Images displayed during closing argument can be particularly prejudicial. *Glasmann*, 175 Wn.2d at 707-709. Such images "may sway a jury in ways that words cannot," and the effect is difficult to overcome with an instruction. *Id.* at 707 (*quoting State v. Gregory*, 158 Wn.2d 759, 866-867, 147 P.3d 1201 (2006)).

This is because:

> [W]ith visual information, people believe what they see and will not step back and critically examine the conclusions they reach, unless they are explicitly motivated to do so. Thus, the alacrity by which we process and make decisions based on visual information conflicts with a bedrock principle of our legal system—that reasoned deliberation is necessary for a fair justice system.

Id. at 709 (*quoting* Lucille A. Jewel, *Through A Glass Darkly : Using Brain Science and Visual Rhetoric to Gain A Professional Perspective on Visual Advocacy*, 19 S. Cal. Interdisc. L.J. 237, 293 (2010)).

The *Fuller* court distinguished the jigsaw puzzle analogy in that case from cases in which a similar argument was found to be improper by drawing a line at the point at which the prosecutor attempts to quantify the state's burden of proof. *See Fuller*, 169 Wn. App. at 825-827 (*discussing State v. Johnson*, 158 Wn. App. 677, 243 P.3d 936 (2010)). The court noted that a prosecutor could use the idea of a jigsaw puzzle to illustrate that the jury could have a few pieces of the story missing and still be convinced beyond a reasonable doubt of the big picture. *Id.*

When a prosecutor actually enumerates the amount of information (or puzzle pieces) that a jury can have to convict, however, s/he impermissibly trivializes and minimizes the state's burden. *Id.*

While the prosecutor at Mr. Grisso's trial may not have verbally told the jury that they could convict even if they had only five out of six pieces of proof, he made that point very clear through visual means. RP 1141-1147, 1151.

As the Supreme Court has recognized, visual images have a greater (and less conscious) impact on a jury than spoken words. *Glasmann*, 175

Wn.2d at 707. The prosecutor at Mr. Grisso's trial communicated to the jury that it could lack exactly 16.6% of the necessary information and still find guilt beyond a reasonable doubt. RP 1141-1147, 1151. The court erred by permitting the prosecutor to make that argument over Mr. Grisso's objection. The argument was improper. *Id.*; *Fuller*, 169 Wn. App. at 825-827.

There is a substantial likelihood that the prosecutor's misconduct affected the outcome of Mr. Grisso's trial. *Glasmann*, 175 Wn.2d at 704. The evidence of premeditation was very slim in Mr. Grisso's case. Under the state's jigsaw puzzle reasoning, however, the jury could have concluded that they should convict Mr. Grisso anyway because the big picture pointed toward guilt even if that small piece had not been proved beyond a reasonable doubt. Mr. Grisso was prejudiced by the prosecutor's trivialization of the state's burden of proof. *Id.*

The prosecutor committed misconduct by quantifying and trivializing the state's burden of proof. *Id.*; *Fuller*, 169 Wn. App. at 825-827. Mr. Grisso's conviction must be reversed. *Id.*

III. THE COURT'S "REASONABLE DOUBT" INSTRUCTION INFRINGED MR. GRISSO'S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR "THE TRUTH," RATHER THAN ON WHETHER THE STATE HAD MET ITS BURDEN OF PROOF.

A jury's role is not to search for the truth. *Emery*, 174 Wn.2d at 760; *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Rather than determining the truth, a jury's task "is to determine whether the State has proved the charged offenses beyond a reasonable doubt." *Emery*, 174 Wn.2d at 760.

Here, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider "the truth of the charge." CP 44.

A jury instruction misstating the reasonable doubt standard "is subject to automatic reversal without any showing of prejudice." *Id.* at 757 (citing *Sullivan v. Louisiana,* 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). By equating proof beyond a reasonable doubt with a "belief in the truth of the charge," the court confused the critical role of the jury. CP 44.

The court's instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery.* In that case, the error stemmed from a prosecutor's misconduct. Here, the prohibited language

reached the jury in the form of an instruction from the court. CP 22. Jurors were obligated to follow the instruction.

Without analysis, Division I has twice rejected a challenge to this language. *State v. Kinzle*, 181 Wn. App. 774, 784, 326 P.3d 870 *review denied,* 181 Wn.2d 1019, 337 P.3d 325 (2014); *State v. Fedorov*, 181 Wn. App. 187, 200, 324 P.3d 784 *review denied,* 181 Wn.2d 1009, 335 P.3d 941 (2014). This court should not follow Division I.

Both *Kinzle* and *Fedorov* erroneously rely on *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The *Bennett* decision does not support Division I's position.

In *Bennett,* the appellant argued *in favor of* WPIC 4.01 (the pattern instruction at issue here), and asked the court to invalidate the so-called *Castle* instruction. *Bennett*, 161 Wn.2d at 308-309. The *Bennett* court was not asked to address any flaws in WPIC 4.01.[11] *Id.*

The *Fedorov* court also relied on *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). In *Pirtle,* as in *Bennett,* the defendant favored the "truth of the charge" language. *Id.,* at 656 n. 3. The appellant challenged a different sentence (added by the trial judge) which inverted

[11] The *Bennett* court upheld the *Castle* instruction, but exercised its supervisory authority to instruct courts not to use it, and to use WPIC 4.01 instead. *Id.,* at 318.

the language found in the pattern instruction. *Id.,* at 656.[12] The *Pirtle* court was not asked to rule on the constitutionality of the "truth of the charge" provision.

Neither *Bennett* nor *Pirtle* should control this case. Division II should not follow Division I's decisions in *Kinzle* and *Fedorov.*

The presumption of innocence can be "diluted and even washed away" by confusing jury instructions. *Bennett*, 161 Wn.2d at 315-16. Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated. *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating reasonable doubt with "belief in the truth of the charge" the court misstated the prosecution's burden of proof, confused the jury's role, and denied Mr. Graves his constitutional right to a jury trial.

Mr. Grisso's conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

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[12] The challenged language in *Pirtle* read as follows: "If, after such consideration[,] you do not have an abiding belief in the truth of the charge, you are not satisfied beyond a reasonable doubt." *Pirtle*, 127 Wn.2d at 656. The appellant argued that the instruction "invite[d] the jury to convict under a preponderance test because it told the jury it had to have an abiding faith in the falsity of the charge to acquit." *Id.,* at 656.

IV. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD DECLINE ANY REQUEST TO IMPOSE APPELLATE COSTS ON MR. GRISSO, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3 612 (2016).[13]

Appellate costs are "indisputably" discretionary in nature. *Sinclair*, 192 Wn. App. at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina,* 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Grisso indigent at the end of the proceedings in superior court. CP 97-100. That status is unlikely to change, especially with the imposition of a lengthy prison term. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

[13] Division II's commissioner has indicated that Division II will follow *Sinclair.*

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

The state presented insufficient evidence for a rational jury to find beyond a reasonable doubt that Mr. Grisso acted with premeditated intent. The prosecutor committed prejudicial misconduct by misstating and mischaracterizing the state's burden of proof and appealing to the jury's passion and prejudice. The court's reasonable doubt instruction improperly focused the jury on a search for the truth rather than on whether the state had met its constitutional burden. Mr. Grisso's conviction must be reversed.

In the alternative, if the state substantially prevails on appeal, this court should decline to impose appellate costs on Mr. Grisso, who is indigent.

Respectfully submitted on July 1, 2016,

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CERTIFICATE OF MAILING

I certify that on today's date:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on July 1, 2016.

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